

ARKANSAS COURT OF APPEALS  
NOT DESIGNATED FOR PUBLICATION  
SARAH J. HEFFLEY, JUDGE

DIVISION IV

CACR 06-902

JIMMY DALE STALLNACKER

June 13, 2007

V.	APPELLANT	APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY [NO. CR-2005-226]
STATE OF ARKANSAS	APPELLEE	HONORABLE HAROLD ERWIN, JUDGE
		AFFIRMED

Appellant, Jimmy Stallnacker, was convicted on charges of aggravated robbery and theft of property and sentenced as a habitual offender to concurrent terms of forty years' imprisonment and five years' imprisonment, respectively. On appeal, appellant contends that the trial court erred in admitting into evidence an in-court identification of appellant by one of the victims after a photo line-up given to the victim, and his subsequent identification of appellant from that line-up, had been previously ruled inadmissible on procedural grounds. We find no error and affirm.

On September 14, 2005, Rosemary Baldrige and her son, Wesley Guntharp, were robbed at gunpoint in Baldrige's apartment. Nicky Murphy, a friend of Baldrige's, had

stopped by Baldridge's apartment with a male friend, who was later identified as appellant. After approximately twenty minutes, the two left, but returned twenty or thirty minutes later with another man and proceeded to rob Baldridge and Guntharp. Guntharp, who had been in town to attend his grandmother's funeral, returned to his home in Florida the next day. On September 21, 2005, a detective with the Newport Police Department conducted an interview with Guntharp over the telephone and emailed three photo line-ups in three separate emails to Guntharp. The detective instructed Guntharp not to discuss the photos or his selections with his mother.

Two days later, on September 23, 2005, Guntharp sent the detective an email identifying a picture of appellant as "without a doubt [t]he guy that pointed the [g]uns at my mother and I the night of the robbery." On January 23, 2006, appellant filed a motion to suppress any evidence of the email identification and any subsequent in-court identification by Guntharp. Appellant argued that the method used by the police to obtain the out-of-court email identification was unreliable, and any in-court identification by Guntharp would be "irreparably tainted." After a hearing on the matter, the court ruled that while the photo line-ups were not unduly suggestive, the evidence from the line-ups could not be admitted because the procedure used by the police was improper. However, the court ruled that the State was free to present an in-court identification through Guntharp's testimony at trial.

The State did indeed present Guntharp's testimony at trial, and at three different points during his testimony, Guntharp positively identified appellant as the person who had robbed him and his mother at gunpoint. Appellant also called Guntharp as a witness at trial, and

appellant's counsel began questioning Guntharp about the previous photo line-up. At that point, the following colloquy took place:

BY MR. HOWARD [FOR THE STATE]: Your Honor, Ms. Reece and I talked about this but just for purposes of the record, she's now going into the photo line-up that the Court ruled was inadmissible. By pursuing this line of questioning, it's the State's position that she has now opened that up and made it admissible evidence, which I intend to pursue on rebuttal. And like I say, we've had this conversation and I think she realizes that.

BY MS. REECE [FOR THE DEFENSE]: Absolutely.

BY THE COURT: You don't object?

BY MS. REECE: To him using it in rebuttal? No, he can use it if he wants to use it.

Appellant's counsel proceeded to elicit testimony from Guntharp confirming his identification of appellant in the photo line-up, and the State confirmed Guntharp's "100% certain" identification of appellant and introduced the photo line-up into evidence without objection by appellant.

On appeal, appellant argues that the trial court erred by allowing Guntharp's in-court identification "after ruling the photo line-up given to the witness was ruled impermissibly suggestive and constitutionally suspect." We first note that appellant has incorrectly summarized the trial court's ruling; the court specifically found that the photo line-up was not unduly suggestive, but instead ruled that the photo line-up was inadmissible on improper-procedure grounds. Our supreme court has ruled:

Even if prior identifications may have been improper or suggestive, an in-court identification will not be suppressed if indicia of reliability are found to independently exist. *Burnett v. State*, 302 Ark. 279, 790 S.W.2d 137 (1990). A court may consider a number of factors in determining whether such indicia of reliability exist, including the

following: the prior opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description, any identification prior to lineup of another person, the identification by picture of the defendant prior to the lineup, failure to identify the defendant on a prior occasion, the lapse of time between the alleged act and the lineup identification, and the degree of certainty that a witness professes to possess that the perpetrator and the defendant are the same individual. *Burnett*, 302 Ark. at 282, 790 S.W.2d 137 (citing *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967), and *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972)).

*Tester v. State*, 342 Ark. 549, 555–56, 30 S.W.3d 99, 103 (2000). We will not reverse a trial court's ruling on the admissibility of an in-court identification unless the ruling is clearly erroneous under the totality of the circumstances. *Mills v. State*, 322 Ark. 647, 910 S.W.2d 682 (1995).

Applying the above factors to the instant case, we note that (1) Guntharp testified that he observed appellant for approximately twenty minutes during appellant's first visit to the apartment, stood within two feet of him several times, and spoke with him; (2) Guntharp testified that he observed appellant pointing the guns at himself and his mother, and during the course of the robbery, appellant again spoke to him; (3) Guntharp has never identified anyone else as the person who pointed the guns at himself and his mother; and (4) Guntharp testified he was "100% certain without a doubt" that appellant was one of the perpetrators. Considering the totality of the circumstances, we cannot say that allowing the in-court identification was clearly erroneous.

Affirmed.

PITTMAN, C.J., and ROBBINS, J., agree.

